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No. 95-2007

In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
KATHERINE S. GRUENHECK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

23 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld enforcement of the Nuclear Regulatory Commission's subpoena *duces tecum* that sought documents related to a nuclear safety investigation within the NRC's investigative authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 73 F.3d 464. The order of the district court (Pet. App. 57a) and the recommendation of the magistrate judge (Pet. App. 45a-56a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1996. A petition for rehearing and a suggestion of rehearing in banc were denied on March 22, 1996. Pet. App. 58a-59a. The petition for writ of

certiorari was filed on June 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Nuclear Regulatory Commission (NRC) is a federal agency created to regulate the use and safety of atomic energy pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.* Pet. App. 3a. The NRC has authority over "public health and safety issues relating to the nuclear power industry in general, and over safety aspects involved in constructing and operating nuclear power plants, in particular." *Ibid.*, citing 42 U.S.C. 2012, 2201; 10 C.F.R. 1.11.

Petitioner Five Star Products, Inc. (Five Star) manufactures grout and structural concrete products and, for 20 years, sold grout to NRC licensees for use in the construction and repair of nuclear facilities. Pet. App. 3a. Prior to the events in this case, the grout carried Five Star's safety certification, signifying to the licensees that the material met the NRC's quality assurance testing standards required of all materials used in the construction of nuclear facilities. *Id.* at 24a; see 10 C.F.R. Pts. 21 and 50, App. B. Such certified material may be installed in safety-related systems without further testing by the NRC-licensed buyer. Pet. App. 46a. Petitioner Construction Products Research, Inc. (CPR) provided the testing services to Five Star that enabled Five Star to certify that the grout complied with the NRC safety standards. *Id.* at 3a.

In June 1992, Edward P. Holub, a CPR employee who was in charge of its quality assurance testing program, contacted the NRC to express his concern

that improper procedures were being used to test Five Star products. Pet. App. 4a. NRC inspectors attempted to inspect CPR's facility, but were denied access to the testing laboratory. *Ibid.* The inspectors contacted the United States Attorney, obtained a search warrant for the facility, and, on September 1, 1992, the United States Marshals executed the warrant and seized numerous documents related to CPR's testing of Five Star's products. *Ibid.* The NRC's investigation of Holub's allegations regarding the safety of petitioners' work place and the products they sold to NRC licensees led to a preliminary determination that most of Holub's allegations were correct. *Id.* at 47a. The NRC decided that immediate corrective action was not required, however, based upon the facts discovered to that date. Because petitioners ceased selling products with the safety certification in late August of 1992, the parties ultimately entered into a stipulation resolving any current enforcement dispute. See *id.* at 71a. The United States Attorney's office conducted a criminal investigation, but concluded it in January 1995 without filing charges. *Id.* at 47a & n.2.

Meanwhile, petitioners learned of Holub's actions and, on January 22, 1993, before the NRC investigation had been completed, CPR fired Holub. Pet. App. 47a. Holub filed a claim with the United States Department of Labor, pursuant to the whistleblower protection provision of the ERA, 42 U.S.C. 5851, which protects an employee from discharge or discrimination on account of having engaged in protected activity, such as assisting in carrying out the AEA by reporting safety concerns to the NRC. Holub alleged that CPR terminated him in retaliation for his notifying the NRC of his concerns about

petitioners' testing procedures. Pet. App. 4a. The Labor Department investigated the charge and found that Holub had engaged in protected activity and had been unlawfully terminated. *Ibid.* Petitioners sought further review of that administrative decision and their appeal is pending. Pet. 6 n.3; Pet. App. 4a, 47a.

The NRC thereafter became concerned about the possible safety implications of Holub's firing and instituted a second investigation to determine whether petitioners' treatment of whistleblowers posed a threat to public health and safety. Pet. App. 4a. In particular, the NRC sought to learn whether petitioners had discouraged any other would-be whistleblowers from coming forward and thereby had increased the likelihood that safety defects may have escaped detection by the NRC. *Ibid.* As part of its second investigation, the NRC issued a subpoena *duces tecum* to petitioner H. Nash Babcock, the custodian of CPR's records. *Id.* at 45a n.1. The subpoena sought production of corporate documents that fall within the following categories: (1) CPR's policies, procedures, and requirements regarding involuntary terminations; (2) "position descriptions of jobs" held by Holub and two other employees; (3) documents related to Holub's termination; and (4) Holub's personnel file. *Id.* at 4a.

Petitioners moved to quash the subpoena before the NRC, contending that the subpoena was not issued pursuant to a lawful purpose because, according to petitioners, the NRC lacked jurisdiction over them and their employment practices. Pet. App. 45a-46a. The NRC denied the motion and upheld the subpoena. *Id.* at 18a-44a. Petitioners still refused to comply with the subpoena, asserting that it arose out of an unauthorized investigation. *Id.* at 48a, 51a.

2. The United States, on behalf of the NRC, petitioned, pursuant to 42 U.S.C. 2201(c), for enforcement of the subpoena in the United States District Court for the District of Connecticut. Pet. App. 4a. The district court ordered enforcement. *Id.* at 57a.

a. Adopting the recommendation of a magistrate judge (Pet. App. 45a-56a, 57a), the district court upheld the validity of the subpoena. As a threshold matter, the court declined to address whether petitioners were subject to regulation by the NRC because, in an administrative subpoena enforcement proceeding, the court lacks authority to make such a determination. *Id.* at 49a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (administrative power of investigation is analogous to grand jury which does not depend on existence of case or controversy for its power to obtain evidence and can investigate "merely on suspicion that the law is being violated, or even just because it wants assurances that it is not"). In an administrative subpoena enforcement proceeding, the agency "must show that the inquiry or investigation which the subpoena advances, not the party to whom it is directed, is within its authority." Pet. App. 53a. The district court therefore may consider only whether the inquiry is within the authority of the agency, whether the demand is sufficiently definite, and whether the information sought is reasonably relevant to the inquiry. *Id.* at 48a, citing *Morton Salt Co.*, 338 U.S. at 652; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946).[1]

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[1] The court explained that petitioners would be able to litigate their jurisdictional challenges if the NRC began an

Because petitioners did not challenge either the definiteness of the subpoena demand or the relevance of the information sought by the subpoena, the court addressed the question whether the inquiry was within the NRC's authority. Pet. App. 53a n.7. On that issue, the subpoenaing agency "need only show that the subpoena seeks information about a matter or issue that Congress authorized the agency to investigate." *Id.* at 48a, citing *Endicott Johnson Corp.*, 317 U.S. at 508.

The court concluded that the NRC was authorized to subpoena the documents "in aid of a lawful investigation into the safety implications of [petitioners'] alleged retaliatory discharge of Holub" for reporting his safety concerns. Pet. App. 53a-54a. The court found that the NRC's legitimate safety concerns included "the possible chilling effect which Holub's retaliatory discharge might have on the willingness of [petitioners'] other employees to bring safety concerns to the NRC's attention and the resulting effect on the safety of [petitioners'] products that were sold to NRC licensees." *Id.* at 54a. NRC had a lawful right to investigate whether petitioners terminated other employees who had raised safety concerns and whether any retaliation against employees who had expressed safety concerns "created an atmosphere in which unsafe products could be sold to NRC licensees for use in nuclear power plants." *Ibid.*[2]

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enforcement proceeding to exercise regulatory authority over their business practices. Pet. App. 51a, 53a.

[2] The district court emphasized that the NRC was acting to ensure public health and safety and not to obtain a private remedy for Holub whose exclusive personal remedy lies with

b. The court also rejected petitioners' claim that the subpoena was overbroad and that the attorney-client privilege shielded the subpoenaed documents from disclosure. Pet. App. 54a-55a. The court found that the overbreadth challenge was not supported by the requisite showing that petitioners' compliance would unduly burden their business operations or that the NRC already possessed the documents. *Id.* at 55a. The court concluded that petitioners had not properly invoked or briefed the attorney-client privilege, having made only a blanket assertion, without particularizing their claims. *Ibid.*

3. a. The court of appeals affirmed. Pet. App. 1a-17a.[3] The court concluded that "[i]n light of the historically expansive interpretation of an agency's power to investigate," the subpoena "lay well within the NRC's authority because it is the primary body responsible for nuclear safety." *Id.* at 7a.[4]

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the Department of Labor pursuant to 42 U.S.C. 5851. Pet. App. 54a & n.8.

[3] Petitioners released to the NRC the documents that they conceded were not privileged, but continued to withhold the allegedly privileged documents. Pet. App. 5a. The court determined that the matter was not moot because of the documents still not surrendered and because petitioners retained a privacy interest in the documents they had surrendered which they claimed was infringed by the NRC's unlawful acquisition of the documents. *Id.* at 7a.

[4] As a preliminary matter, the court addressed its jurisdiction to hear the appeal despite the fact that the subpoenaed party had not been held in contempt. Pet. App. 5a-6a. The court recognized that a finding of contempt is generally required before an order enforcing a subpoena in a civil, criminal, or grand jury proceeding is final and appealable under 28 U.S.C. 1291. Pet. App. 5a-6a. But it held that an order enforcing a subpoena issued by a government agency in connection

The court reviewed the historical background of administrative investigatory authority, Pet. App. 8a-10a, pointing out that this Court's decision in *Endicott Johnson Corp.* established that probable cause to believe that a particular statute was being violated is not a prerequisite to an administrative agency investigation. Pet. App. 9a. Like a grand jury, an agency can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 9a-10a, quoting *Morton Salt Co.*, 338 U.S. at 642-643. The court held that "at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." Pet. App. 10a, citing *Endicott Johnson Corp.*, 317 U.S. at 509; see also Pet. App. 14a-15a.

The court of appeals recognized that the disclosure sought by an agency subpoena is limited, however, by a requirement of reasonableness. Pet. App. 10a. That limitation is satisfied so long as the agency establishes that the investigation is conducted pursuant to a legitimate purpose, the inquiry is relevant to the purpose, the information sought is not already within the agency's possession, and the necessary administrative steps are followed. *Ibid.*

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with an administrative investigation is appealable under Section 1291 without a contempt finding because no other judicial proceeding is halted by permitting the subpoenaed party to appeal. Pet. App. 6a, citing *Cobbledick* v. *United States*, 309 U.S. 323, 330 (1940).

The court held that the NRC's subpoena to petitioners was reasonable. Pet. App. 11a-15a. The court cited the NRC's responsibility "to ensure that the generation and transmission of nuclear power do not unreasonably threaten public safety and welfare." *Id.* at 11a, citing 42 U.S.C. 2012. The NRC is expressly authorized to:

> make such studies and investigations, obtain such information and hold such meetings or hearings as the [NRC] may deem necessary or proper to assist it in exercising any authority provided in this chapter, * * * or any regulations or orders issued thereunder. For such purposes the [NRC] is authorized * * * by subpena to require any person to * * * appear and produce documents.

42 U.S.C. 2201(c), quoted at Pet. App. 11a.[5] The court ruled that it did not take any "stretch of the imagination" to find reasonable NRC's concern that public safety could be jeopardized by an employment practice "of squelching employee disclosure of nuclear risks." *Id.* at 12a. The information subpoenaed could reveal

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[5] The court rejected petitioners' argument that they are beyond the NRC's investigatory powers because, according to petitioners, they are not "persons" within the meaning of Section 2201(c), on account of their being suppliers to the nuclear industry and not subject to the AEA or the ERA. Pet. App. 14a-15a. The court held that petitioners clearly fall within the broad statutory definition of person set forth in 42 U.S.C. 2014(s). The court again distinguished the NRC's investigative authority from its enforcement jurisdiction, observing that, "[i]f and when the NRC decides to use the information obtained by the subpoena, [petitioners] may then challenge whether they fall within the NRC's enforcement jurisdiction." Pet. App. 15a, citing *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946); *Endicott Johnson Corp.*, 317 U.S. at 509.

the existence of such an employment practice or might assure the NRC that such practices are not taking place. *Id.* at 13a. The court observed that "[u]nless the NRC is permitted to investigate whether an employer regularly stifles disclosure of possible nuclear hazards," the practice could go unchecked—"a situation rife with safety ramifications." *Id.* at 12a. The court reasoned that, under its statutory mandate to ensure safety from nuclear risks, the NRC might use the information obtained by the subpoena to exercise its rule-making authority, to issue notices of non-conformance, or to report to Congress. *Id.* at 13a, citing 10 C.F.R. 1.11(b), 2.201; 42 U.S.C. 2210(p). Because the information subpoenaed clearly was relevant to a lawful purpose of NRC in the discharge of its duties, the court found that the issuance of the subpoena was within the NRC's statutory authority. Pet. App. 13a.

The court rejected petitioners' claim that the NRC did not have the authority to conduct the investigation at issue here because that authority had been delegated by Congress to the Department of Labor. Pet. App. 13a-14a. Although Congress gave to the Labor Department the authority, under the whistleblower protection provision of the ERA, 42 U.S.C. 5851, to resolve personal retaliation claims, the NRC's investigation here was not an attempt to adjudicate such a claim. Rather, the aim of the NRC's investigation was quite distinct—the NRC was investigating petitioners' *general* practices to determine what effect they might have on would-be whistleblowers. Pet. App. 14a. And, the NRC has the authority to order nuclear facilities to take steps to correct any threats to public health and safety, including those caused by the use of faulty materials,

whereas the Labor Department's remedial authority is limited to ordering reinstatement and backpay. *Ibid.*

b. The court of appeals also rejected petitioners' claim of attorney-client and work product privilege. Pet. App. 15a-17a. The court found that petitioners failed to meet their burden of establishing either privilege, citing their inadequate log, their overly general allegations, and their failure to provide sufficient information to support the claims as to individual documents. *Ibid.*

ARGUMENT

1. Petitioners do not dispute that the NRC has broad investigative subpoena power relating to matters of nuclear health and safety. Instead, they contend (Pet. 10-18) that the court of appeals erred in refusing to rule on their claim that they are not subject to regulation by the NRC.[6] Petitioners argue (Pet. 12) that the court of appeals misapplied *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 508-509 (1943), and that the question of statutory coverage should have been decided at the subpoena enforcement stage in light of the fact that the NRC already had decided the coverage question and the subpoena did not seek information going to the coverage question. Petitioners also contend (Pet. 13-15) that the court of appeals' ruling conflicts with authority from other circuits regarding whether a question of regulatory

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[6] Petitioners assert (see Pet. 10 n.5) that, as mere suppliers of materials to the nuclear industry, they are not subject to regulation under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, or the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*, and are not employers subject to the whistleblower protection statute, 42 U.S.C. 5851.

jurisdiction can be addressed at the subpoena enforcement stage.[7] Petitioners claim (Pet. 12, 16-18) that they will not have another opportunity to litigate the NRC's authority to subpoena the documents.

The court of appeals correctly followed *Endicott Johnson Corp.*, 317 U.S. at 508 & n.11, in holding that the district court did not err by refusing to address the question whether petitioners are subject to the NRC's regulation. The question before the court was the enforceability of the NRC's subpoena and, under *Endicott Johnson Corp.*, the district court was not required to decide whether petitioners were subject to regulation by the NRC because that was not a defense to the subpoena, but rather a matter that could be resolved when and if an administrative proceeding is brought against petitioners. 317 U.S. at 508-509. Moreover, the court correctly held that the documents were lawfully subpoenaed under *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950), in that they were subpoenaed pursuant to an inquiry within the NRC's authority, the documents sought were relevant to that inquiry, and the subpoena was not indefinite. *Ibid.* The court of appeals correctly held that, so long as there is authority for the agency's investigation, the agency's enforcement jurisdiction over the subpoena recipient is not relevant to the question of the enforceability of an

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[7] Despite the outstanding enforcement order regarding all of the documents covered by the subpoena, petitioners continue to withhold some documents as to which their claim of privilege has been rejected on the merits by both the district court and the court of appeals. Pet. 9. Petitioners do not, however, challenge the court of appeals' ruling that they failed to establish a claim of privilege as to any of the documents requested. *Ibid.*

investigative subpoena. Simply put, the NRC's subpoena authority is not dependent upon its jurisdiction to take enforcement action against the subpoenaed entity. See Pet. App. 12a.[8]

Petitioners attempt to avoid *Endicott Johnson Corp.* by claiming that, in this particular case, the agency already ruled on the question whether petitioners are subject to its regulatory jurisdiction and, therefore, there is no reason for the court not to reach the issue as well. See Pet. 12. Petitioners' contention is, in essence, that the issue of the agency's enforcement jurisdiction became relevant to this particular subpoena enforcement proceeding because the NRC discussed the issue in the course of its decision denying petitioners' motion to quash the subpoena. But, the *dictum* in the NRC's opinion discussing its view of its regulatory enforcement authority beyond this action cannot alter the fact that this case is merely a subpoena enforcement proceeding and not a regulatory enforcement proceeding. The question of the NRC's jurisdiction to regulate petitioners (rather than merely obtain subpoenaed documents from them) does not raise a proper defense to the enforcement of the subpoena and would be ripe for judicial review only if the NRC were to attempt to exercise such regulatory authority over petitioners. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (holding that, although agency must defend purpose behind investigation, it is not required

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[8] The NRC's functions are not limited to enforcement proceedings and include, *inter alia*: Standard setting and rulemaking; technical reviews and studies; public hearings; issuance of authorizations, permits and licenses; inspection, investigation, and enforcement; evaluation of operating expenses; and confirmatory research. See 10 C.F.R. 1.11(b).

to prove cause of action at subpoena enforcement stage); *Endicott Johnson Corp.*, 317 U.S. at 509; *United States* v. *Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir.) ("questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings") petition for cert. pending No. 96-234 (filed Aug. 12, 1996); *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *Newmark & Co.* v. *Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964).

The cases cited by petitioners (Pet. 13) as conflicting with the ruling below addressed circumstances that are distinguishable from the instant case in relevant respects. Denial of enforcement of an agency subpoena typically occurs where the agency's subpoena falls outside the agency's lawful investigative authority. See *FTC* v. *Ernstthal*, 607 F.2d 488, 490-491 (D.C. Cir. 1979). Most commonly those cases involve a statute that narrowly circumscribes the agency's investigative authority or specifically exempts certain entities from the agency's investigative reach, thus giving rise to investigatory coverage questions that are ripe for review at the investigative stage. *E.g.*, *FTC* v. *Miller*, 549 F.2d 452, 455 (7th Cir. 1977) (common carriers exempt from FTC's investigative authority; subpoenaed parties "concede[d] that if they were insisting only on the right not to be regulated, as distinguished from the right not to be investigated, the strong policy against litigating the issue of coverage * * * in a subpoena enforcement proceeding" would have rendered their position untenable); *Reich* v. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993) (tribal entities exempt from federal wage and hour laws and

not subject to subpoena authority); *FEC* v. *Florida for Kennedy Comm.*, 681 F.2d 1281 (11th Cir. 1982) (constitutional constraints on Commission's jurisdiction to regulate exercise of political rights). *Jewel Cos.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970), and *Territorial Ct. of the Virgin Islands* v. *Richards*, 847 F.2d 108 (3d Cir.), cert. denied, 488 U.S. 955 (1988), are to the same effect. As the cases cited by petitioner acknowledge, however, "an individual may not normally resist an administrative subpoena on the ground that the agency lacks regulatory jurisdiction if the subpoena is issued at the investigational stage of the proceeding." *Ernstthal*, 607 F.2d at 490-491. In *FTC* v. *Feldman*, 532 F.2d 1092, 1095-1096 (1976), the Seventh Circuit also expressly emphasized that it is well settled that courts "should not interrupt the administrative process except under very limited and exceptional circumstances." Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). The instant case does not present such circumstances.

Petitioners err in suggesting (Pet. 16-17) that, by not reaching the issue of the scope of NRC enforcement jurisdiction, the court of appeals deprived them of the opportunity to litigate the NRC's subpoena authority. Petitioners fully litigated the NRC's *investigative* authority to subpoena the records requested here and the court of appeals correctly rejected petitioners' arguments, finding a nexus between the NRC's investigation and safety implications of petitioners' activities. The only matter that must await later adjudication is the authority of the NRC to exercise jurisdiction to *regulate* petitioners, and that matter will be ripe for adjudication only if and when the NRC attempts to exercise such jurisdiction.

2. Petitioners contend (Pet. 18-19) that the court of appeals erred because it failed to identify a specific statutory grant of authority for the NRC's investigation and relied only on the general grant of subpoena power to the NRC in 42 U.S.C. 2201(c). It is well established that the NRC has broad authority over public health and safety issues relating to the nuclear power industry in general, *English* v. *General Elec. Co.*, 496 U.S. 72, 81-82 (1990), and over "radiological safety aspects involved in the construction and operation of a nuclear plant" in particular, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 205 (1983). The agency's source of plenary authority in this field is the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*

The courts below correctly held that the AEA, as supplemented by the ERA, constitutes fully sufficient legal authority for the NRC's investigation underlying the subpoena at issue here. As the district court found:

> [T]he NRC is authorized to subpoena documents from respondents in aid of a lawful investigation into the safety implications of respondents' alleged retaliatory discharge of Holub for engaging in protected activity. The legitimate safety concerns of the NRC include the possible chilling effect which Holub's retaliatory discharge might have on the willingness of respondents' other employees to bring safety concerns to the NRC's attention and the resulting effect on the safety of respondents' products that were sold to NRC licensees.

Pet. App. 53a-54a. Similarly, the court of appeals held:

> [T]he NRC is attempting to investigate [r]espondents' *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers. That aim is quite distinct from the aim of the DOL investigation.

Id. at 14a.

The findings by the courts of a nexus between the subpoenaed materials and a lawful NRC inquiry into nuclear safety concerns sufficed to support the enforcement of the subpoena under *Endicott Johnson Corp.*, 317 U.S. at 508 & n.11. See also *Morton Salt Co.*, 338 U.S. at 642-643; *Sturm, Ruger & Co.*, 84 F.3d at 4. The court of appeals' analysis is also consistent with decisions of the First and Third Circuits which have addressed the scope of the NRC's subpoena authority. *United States* v. *Comley*, 890 F.2d 539 (1st Cir. 1989); *United States* v. *Oncology Servs. Corp.*, 60 F.3d 1015, 1018-1019 (3d Cir. 1995).

3. Petitioners contend (Pet. 20-23) that the court of appeals' decision conflicts with this Court's decision in *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), and the Tenth Circuit's decision in *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505 (1985), cert. denied, 478 U.S. 1011 (1986).

Petitioners' contention is premised on the erroneous view of the NRC's investigation as an investigation for purposes of protecting employees from adverse employment consequences. But the NRC was not taking a "role in employment matters" as petitioners contend (Pet. 21). The court of appeals below specifically recognized the distinction between a NRC investigation of general nuclear safety and a

Department of Labor proceeding on behalf of a nuclear whistleblower under 42 U.S.C. 5851(b), stating:

> It bears emphasis * * * that the NRC is not trying to adjudicate Holub's individual retaliation claim; Holub himself has already filed a claim with the DOL and has received a favorable decision. Instead, the NRC is attempting to investigate Respondents' *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers.

Pet. App. 14a. Further, the court below noted (*ibid.*) that the implications of whistleblower retaliation in this context go far beyond the rights of the workforce. If employees are stifled from disclosing defects in safety-grade products supplied to nuclear facilities, there is an indisputable potential for harm to the general health and safety of the public. The fact that the NRC did not find a safety defect in petitioners' product during its initial investigation (Pet. 23) does not eliminate the NRC's safety concern regarding whether disclosure of defects was being chilled by threats of retaliation. See, *e.g.*, 10 C.F.R. 50.7. For example, if the NRC finds evidence of a pattern of discrimination and harassment that compromised the integrity of petitioners' products, the NRC may direct all nuclear plants who may have purchased such products to take appropriate action to ensure that those products do not adversely affect public health and safety. The court found that the NRC subpoena was based on this broader concern. See Pet. App. 14a.

Thus, the court of appeals' ruling is not inconsistent with this Court's decision in *English* v. *General*

Electric Co., or the Tenth Circuit's decision in *Kansas Gas*. In *English*, the Court merely held that a whistleblower discrimination action under 42 U.S.C. 5851 does not preempt a state law tort claim. 496 U.S. at 82. In reaching that conclusion, the Court reiterated that the federal government has preempted the field of radiological safety aspects involved in the construction and operation of a nuclear plant. In *Kansas Gas*, the Tenth Circuit concluded that, although the Labor Department has exclusive jurisdiction over remedies for individual whistleblower retaliation claims under Section 5851, the NRC has regulatory responsibility for all other matters relating to nuclear safety. 780 F.2d at 1508-1509. The NRC's subpoena to petitioners sought documents in aid of a lawful investigation into such nuclear safety matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
KATHERINE S. GRUENHECK
Attorneys

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC., FIVE STAR PRODUCTS, INC. AND H. NASH BABCOCK, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

MICHAEL F. MCBRIDE
(Counsel of Record)
DEIRDRE G. JOHNSON
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 986-8000

EUGENE R. FIDELL
FELDESMAN, TUCKER, LEIFER, FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

HAROLD JAMES PICKERSTEIN
TRAGER AND TRAGER
1305 Post Road
Fairfield, Connecticut 06430
(203) 255-6138

Counsel for Petitioners

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Argument

Certiorari should be granted for three main reasons. First, the decision below stands in defiance of the unanimous decision of this Court, rooted in the plain meaning of an Act of Congress, that employment practices are not the NRC's business. The decision below compounds this error by refusing to address this issue of agency jurisdiction on which the agency has already definitively spoken, and by disregarding the fact that the subpoenaed party will have no future opportunity to obtain judicial review of the issue. Finally, the Court of Appeals' willingness to enforce the subpoena absent a grant of substantive statutory authority to the agency creates a split with at least five other Circuits.

1. The government's Question Presented characterizes the NRC proceeding in which the disputed subpoena was issued as a "nuclear safety investigation." Later, taking its cue from the Court of Appeals, the government maintains that the NRC was merely investigating petitioners' "*general* employment practices." Opp. 17-18. These characterizations are transparently incorrect. As the NRC itself stated, the purpose of the investigation is

> "to determine if CPR deliberately violated the NRC's whistleblower protection provision [10 C.F.R. § 50.7] by firing Mr. Holub when it discovered that he had informed the NRC of his safety concerns." *In re Henry Allen*, 39 NRC 336, 345 (1994).

The text of the subpoena confirms the accuracy of this description, as does the NRC's statement that what it calls "The Holub Investigation," Pet. 26a, concerns "the circumstances of [a particular, named employee's] termination." Pet. 27a-28a. The NRC's willingness to permit petitioners' products to continue to be sold to the nuclear industry, 61 Fed. Reg. 562 (1996); Pet. 5, 71a, also demonstrates that those products raise no safety concerns. Against this backdrop, the government's effort to paint the subpoena in radioactive colors—a ploy to which it is no stranger, *e.g.*, *Professional Reactor Operator Soc'y v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991) (R. B. Ginsburg, J.)—is designed to distract the Court from the issues and avoid the clear teaching of *English v. General Elec. Co.*, 496 U.S. 72, 83 n.6 (1990).[1]

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[1] There is no need to elaborate on *English* in this reply brief. The government's Opposition (at 19) simply ignores the pertinent portion of that unanimous decision. This Court focused expressly on the statutory allocation of responsibility between the NRC and the Department of Labor in a manner that is entirely consonant with petitioners' position

2. The government concedes that the NRC has conducted two separate investigations of petitioners. Opp. 3-4. The *first* investigation—into the safety of their products that were sold to the nuclear industry—was conducted pursuant to the NRC's lawful authority over petitioners under 42 U.S.C. § 5846. Pet. 5-6; Pet. 24a-26a.[2] That provision is the NRC's *only* authority over suppliers such as petitioners. Congress added it to the ERA in 1974 precisely because the NRC did not have AEA authority over suppliers. The first investigation found no safety impediment to sale of petitioners' products. 61 Fed. Reg. 562 (1996).

3. The subpoena at issue opened the NRC's *second* investigation. The agency—as opposed to the *post hoc* rationalization of its counsel—invoked 42 U.S.C. § 5851 as authority for the subpoena. Pet. 34a-35a. The government has abandoned reliance on that provision, Opp. 17-19, presumably because it does not help the NRC. Unlike § 5846, § 5851 does not cover suppliers. Above all, even if it did, it is a grant of authority only to the Secretary of Labor as a matter of plain meaning. *See English, supra.*[3]

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and entirely at odds with the strained analysis offered by the Court of Appeals. The government's cavalier treatment of the Tenth Circuit's opinion in *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) is equally surprising.

[2] The government is incorrect in asserting (Opp. 9 n.5, 11 n.6) that petitioners contend that they are "beyond the NRC's investigatory powers" and "are not subject to regulation under . . . the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*" As suppliers, they are subject to NRC authority under 42 U.S.C. § 5846, which is part of the ERA and not part of the Atomic Energy Act ("AEA"). Petitioners are *not* subject to the AEA or parts of the ERA other than § 5846, such as § 5851 (on which the NRC relied in substantial part, Pet. 30a-38a, in upholding the subpoena).

[3] Section 5846 refers to those "supplying" products to the nuclear industry as being subject to its terms; the subsequently enacted § 5851 applies to NRC licensees and their "contractors" but does *not* refer to suppliers. Congress amended § 5851 in 1992 to overturn *Adams v. Dole*,

4. The NRC also relied on its general subpoena power under the AEA as support for its investigation of Mr. Holub's termination. Pet. 30a. The flaw in this is that the NRC had to have specific statutory authority to conduct the second investigation. Pet. 18-19.

a. The text of AEA § 161c limits the NRC's subpoena power to investigations in aid of "authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder." "[T]his chapter" is the AEA, yet throughout this litigation—and to the present moment—the government has failed to cite any specific provision of that statute that authorizes the NRC to concern itself with employment practices, let alone nonlicensees' employment practices. Rather, the government contents itself with a sweeping "*et seq.*" reference to the entire AEA and ERA. Opp. 16. Having the power to subpoena information from all "persons"[4] does not, contrary to the Opposition, grant an agency authority over matters *outside* its statutory responsibilities. To overlook this is to confuse tools with jobs; a subpoena is merely a tool.

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927 F.2d 771 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991). It considered amending § 5851 to cover all employers engaged in any activity under the ERA or AEA, but ultimately decided not do so, opting instead to add certain defined categories of "employers" to those previously covered. None of the categories added in 1992 extends to petitioners.

[4] Of course, if the NRC had a substantive grant of authority, it could subpoena relevant information from anyone who possessed it. But the mere fact that petitioners are "persons" within the meaning of the AEA (42 U.S.C. §2014(z)), does not grant the NRC authority over their employment practices. Contrary to the government's claim, Opp. 9 n.5, petitioners have never contended that they are not "persons" within the meaning of the AEA.

b. An agency investigation cannot be lawful if it is not based on specific statutory authority.[5] Otherwise, the NRC's power to subpoena information from any "person" would be a roving commission without precedent in American administrative law. It would permit the agency to investigate literally anything and, as a practical matter, would entirely thwart judicial review of agency claims to investigative jurisdiction—something Congress cannot be presumed to have intended. *E.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (collecting cases). But the NRC has no such roving commission. Congress did not give it authority over employment matters, even though such matters may implicate nuclear safety. *English*, 496 U.S. at 83 & n.6; *Kansas Gas & Elec., supra*, 780 F.2d at 1509. If embraced, the government's position would permit the NRC to investigate, for example, unfair labor practices or violations of collective bargaining agreements or the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1994), each of which is the responsibility of some other agency. While the NRC's lack of authority over whistleblowing is all too apparent from its inability to point to any substantive grant of authority in the AEA, it is highly probative that Congress has given *another* agency—the Department of Labor—precisely that authority. Thus, the NRC's lack of AEA authority to support this subpoena, and the Department of Labor's express grant of authority, are two sides of the same legislative coin.

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[5] The decision below conflicts with the holdings of at least five Circuits regarding the need for specific statutory authority to support a subpoena. Pet. 18-19. The government's effort to distinguish the cases was anticipated in the petition and is unpersuasive.

5. In its effort to avoid judicial review of petitioners' jurisdictional claim, the government maintains that the NRC's assertion of jurisdiction was dictum. Opp. 13. This is plainly incorrect, as a glance at the NRC's decision reveals. Additionally, it slights the agency's role under *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The Court there held that if an agency had not ruled on jurisdictional issues, the subpoena enforcement court has no duty to do so either. *Id.* at 508-09. But the opinion plainly leaves it to the agency's discretion whether to address such issues at the subpoena stage. Here, the NRC addressed the jurisdictional issue explicitly and at great length, following extensive briefing. Its published opinion says in so many words that it was asserting jurisdiction. Pet. 30a, 38a. Where this is the case, nothing in *Endicott Johnson* frees the subpoena enforcement court from the duty to determine the legal correctness of the agency's jurisdictional claim. Petitioners have a right to that determination now under *United States v. Morton Salt Co.*, 338 U.S. 632, 652-54 (1950).

6. Finally, the government observes that petitioners could litigate the NRC's jurisdiction "only if the NRC were to attempt to exercise such regulatory authority over" them. Opp. 13; *see also id.* 15. The difficulty with this is that the government has not taken issue with petitioners' demonstration that there can be no future opportunity to litigate the issue because petitioners are not subject to the NRC's regulatory regime and none of the other kinds of steps the NRC can take are judicially reviewable. *See* Pet. 16-18.[6] The government's deafening silence on this critical

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[6] Rummaging in its regulations, the government has belatedly proffered a variety of further nonenforcement actions it can take, beyond the three cited by the Court of Appeals. Opp. 13 n.8. Far from aiding the government's cause, these afterthoughts confirm that this is petitioners' only opportunity for judicial review of their jurisdictional objection to the

point ignores the teaching of *Morton Salt*, 338 U.S. at 654, that courts should review agency jurisdictional claims when "no chance is given for a test of reasonable objections" later. That silence also confirms petitioners' contention that for purposes of judicial review of the NRC's assertion of authority over them, it truly is "now or never." *See* Pet. 17-18 & n.11.

Conclusion

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL F. MCBRIDE
(Counsel of Record)
DEIRDRE G. JOHNSON
LEBOEUF, LAMB, GREENE
& MACRAE, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 986-8000

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subpoena. The new entrants on the list of possible agency activities are either patently not subject to judicial review at all (*e.g.*, "technical reviews and studies," "public hearings," "confirmatory research," "evaluation of operating expenses" [*sic*; "operating experience" in original]) or patently not subject to judicial review at petitioners' behest (NRC licensure of third parties). *See* Pet. 16-17.